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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1537

ALAN D. EISENBERG and SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR REHEARING

RICHARD L. CATES
JOHN H. BOWERS
BRUCE F. EHLKE

LAWTON & CATES
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Petitioners

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1537

ALAN D. EISENBERG and SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR REHEARING

Sydney and Alan Eisenberg pray that this Supreme Court of the United States grant rehearing of its order of May 17, 1971, denying their petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Wisconsin Supreme Court as prayed for in the petition filed with this Court on April 2, 1971. That petition sought review of a State Bar disciplinary case and of questions concerning licensed attorneys' rights secured under the Ist and XIVth Amendments to the United States Constitution. Your petitioners pray that this Court grant rehearing for the reasons that follow.

I. DENIAL OF THE EISENBERGS' PETITION FOR WRIT OF CERTIORARI IN ALL LIKELIHOOD FORECLOSES ANY REVIEW OF THE URGENT AND COMPELLING ISSUES RAISED IN THIS CASE CONCERNING THE RELATIONSHIP BETWEEN THE COURTS AND THE ATTORNEYS WHO PRACTICE BEFORE THEM, WHICH ISSUES ARISE UNDER THE Ist AND XIVth AMENDMENTS TO THE UNITED STATES CONSTITUTION.

United States district courts and circuit courts of appeals have held that neither in a related Federal court disbarment, nor even in an original action commenced under the Civil Rights Act, will they entertain a challenge to the substantive or procedural constitutionality of a State court judgment rendered in a bar disciplinary action. The way by which a defendant may seek to challenge the constitutionality of a judgment against him in such an action is to petition the United States Supreme Court for a writ of certiorari to the State court. E.g., *Ginger v. Circuit Court,* 372 F. (2d) 621, 625 (6th Cir.), cert. denied, 387 U.S. 935 (1967); *In re Rhodes,* 370 F. (2d) 411, 413 (8th Cir.), cert. denied, 386 U.S. 999 (1967); *Clark v. Washington,* 366 F. (2d) 678, 680-681 (9th Cir. 1966); *Howard v. District Court,* 318 F. (2d) 521, 523 (10th Cir. 1963); *Gately v. Sutton,* 310 F. (2d) 107, 108 (10th Cir. 1962); *Saier v. State Bar,* 293 F. (2d) 756, 760 (6th Cir.), cert. denied, 368 U.S. 947 (1961); *In re MacNeil,* 266 F. (2d) 167, 170 (1st Cir.), cert. denied sub nom., *MacNeil v. Julian,* 361 U.S. 861 (1959); *In re Noell,* 93 F. (2d) 5, 7 (8th Cir. 1937); *Mackay v. Nesbitt,* 285 F. Supp. 498, 503 (D. Alas. 1968), aff'd, 412 F. (2d) 846 (9th Cir.), cert. denied, 396 U.S. 960 (1969); *Jones v. Hulse,* 267 F. Supp. 37, 39 (E.D. Mo. 1967), aff'd, 391 F. (2d) 198 (8th Cir.), cert. denied, 393 U.S. 889 (1968); *Lenske v. Sercombe,* 266 F. Supp. 609, 612 (D. Ore. 1967); *Campbell v. State Bar Associa-*

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Since the Wisconsin Court's judgment in this case,[1] licensed attorneys in Wisconsin must now steer far clear of any speech activity critical of a sitting judge, lest they too be charged as were the Eisenbergs, prosecuted pursuant to the same kind of unfair procedures that were followed in the Eisenbergs' case, adjudged guilty and punished for "disrespect" and "unprofessional" conduct". See generally Brief for ACLU as Amicus Curiae at 5-9. Given the reluctance of the lower courts of the United States to

1. Sydney and Alan Eisenberg were not charged with extortion or blackmail; no attempt was made to prove they were guilty of such conduct; and there is no evidence that they were guilty of such conduct. (App. 101-102, 153.) The Wisconsin Court's finding that the Eisenbergs had "forced" Judge Krueger to appoint them to a committee and to read a press release is based on its findings concerning their speech activities, and not on any finding they had engaged in some extortionate conduct. *See* State v. Eisenberg, 48 Wis. (2d) 364, 379, 180 N.W. (2d) 529 (1970).

entertain any challenge to the constitutionality of a State court judgment rendered in a bar disciplinary action as here, this chilling effect must, in all likelihood, continue if a writ of certiorari does not now issue so that review may be had before the United States Supreme Court, and guidelines furnished as to the limits on attorneys' rights secured under the Ist Amendment to comment regarding judges and courts.[2]

II. THERE IS A CONFLICT BETWEEN THE DECISION OF THE WISCONSIN SUPREME COURT IN THIS CASE AND A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WHICH CONFLICT REQUIRES THIS COURT TO FURNISH GUIDELINES AS TO THE PERMISSIBLE LIMITS ON THE EXERCISE BY ATTORNEYS OF RIGHTS SECURED UNDER THE Ist AMENDMENT.

The United States Court of Appeals for the Seventh Circuit has recently held that absent "specific findings" to establish that the comment poses a "clear and present danger"—or at least a "reasonable likelihood", of a "serious and imminent threat to the

2. That the same critical issues raised in this case may be raised again in the Wisconsin Court by an attorney who is charged with "disrespect" and "unprofessional conduct", because of his speech activity concerning an elected judge, is not a practical alternative to review of these issues by the United States Supreme Court in this case. Only an attorney with great fortitude and resources will dare to place himself in a position where he must be subjected to a trial—such as that given the Eisenbergs, prior to the Wisconsin Court according some guidance as to what it considers to be a licensed attorney's rights secured under the Ist Amendment. Further, this Court has frequently held that the constitutionally permissible perameters of a statute that impinges on the exercise of rights secured under the Ist Amendment—such as sec. 256.29, Wis. Stat., here, are not to be hammered out on a case by case basis. *E.g.*, Baggett v. Bullitt, 377 U.S. 360, 378-379 (1964); *cf., eg.*, Dombrowski v. Pfister, 380 U.S. 479, 486-487 (1965). Finally, of course, such an alternative would not vindicate the rights of Sydney and Alan Eisenberg.

administration of justice", a court cannot constitutionally impose a prior restraint on attorneys' rights secured under the Ist Amendment to comment concerning litigation in which they are engaged. *Chase v. Robson,* 435 F. (2d) 1059, 1061 (7th Cir. 1970). This decision was rendered in May of 1970.

In November of 1970, the Wisconsin Supreme Court entered its judgment against Sydney and Alan Eisenberg, punishing them for comment concerning a court and an elected judge, regarding matters not even involving litigation in which they were engaged. Notwithstanding the defense had on repeated occasions raised the issue that the speech activity alleged to have been engaged in by the Eisenbergs was constitutionally protected (App. 17-18, 31-33, 37-39, 105, 108), and had pointed out in its briefs that it was so protected absent a showing that it somehow posed a threat to the administration of justice,[3] the State prosecutors never charged or attempted to prove—and there is no evidence, that the Eisenbergs' speech activity posed any threat whatsoever to the administration of justice. And the Wisconsin Court made no specific—or even general, finding to establish that any speech activity engaged in by the Eisenbergs posed any threat to the administration of justice. See *State v. Eisenberg,* 48 Wis. (2d) 364, 379, 180 N.W. (2d) 529 (1970).

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3. *E.g.,* Statement of Authorities [in support of Motion to Strike, Demurrer and Motion to Dismiss Complaint—which motion was filed on November 12, 1968,] at 8; Memorandum of Authorities in Support of: Motion for Separate Hearings, Motion for Discovery and Motion to Docket and Set for Argument the Legal Defenses Raised by Defendants' Answer Prior to Evidenciary Hearing [—which brief is dated January 14, 1969,] at 51-53; Brief in Support of Defendants' Motion for Rehearing [—which motion was filed on November 4, 1970,] at 2-3. For the Court's convenience, two copies of each of these three briefs have been filed together with this Petition for Rehearing.

The Wisconsin Court's decision in this case which holds that licensed attorneys may be punished for comment critical of an elected judge, regarding matters not involving litigation in which they are engaged, without there being any showing of some threat to the administration of justice, is irreconcilable with the decision of the Seventh Circuit Court of Appeals which holds that attorneys may comment, regarding even matters involving litigation in which they are engaged, absent a specific showing of some threat to the administration of justice.[4] Both of these decisions must be looked to by attorneys in Wisconsin for guidance as to the perameters of their rights secured under the Ist Amendment. The conflict between these two decisions can only be cleared up by the United States Supreme Court. It is critical to the exercise by licensed attorneys of rights secured under the Ist Amendment that the Eisenbergs' petition for writ of certiorari be granted, and that this Court furnish guidelines as to the constitutionally permissible limits of and limitations on attorneys' comment regarding the courts and judges before whom they practice.

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4. The Wisconsin Supreme Court's decision also is not reconcilable with the decision of the three-judge United States court in Eisenberg v. Boardman, for under the Wisconsin Court's reading of the Ist Amendment, licensed attorneys may be punished for engaging in the very speech activities that the United States court said were constitutionally protected. *Compare* State v. Eisenberg, 48 Wis. (2d)at 379, 108 N.W. (2d) 529 *with* Eisenberg v. Boardman, 302 F. Supp. 1360, 1362-1364 (W.D. Wis. 1969). Indeed, the Wisconsin Court's decision in this case is contrary to that Court's own prior decision in In re Cannon, 206 Wis. 374, 405-409, 240 N.W. 441 (1932).

III. NEW EVIDENCE DEMONSTRATES THE CRITICAL EFFECT OF THE WISCONSIN COURT'S FAILURE TO ADDRESS ITSELF TO THE BRESSETTE AFFIDAVIT AND AGAIN EMPHASIZES THE DENIAL BY THE STATE IN THIS CASE OF THE RIGHTS OF SYDNEY AND ALAN EISENBERG, SECURED UNDER THE XIVTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO A FAIR AND FULL HEARING.

Filed with this Petition for Rehearing is the affidavit of Michael Bressette dated June 1, 1971.[5] The information set forth in this affidavit was brought to the attention of the defense in this case only within the last few weeks.[6] In this affidavit Bressette says that he was paid money by the State's key witness against Sydney and Alan Eisenberg—Attorney Edward Cameron, not to speak with various State authorities concerning perjured testimony against the Eisenbergs given by him at their trial.

An earlier affidavit of Michael Bressette, dated June 24, 1970, was filed with the Wisconsin Supreme Court prior to that Court's entry of judgment against Sydney and Alan Eisenberg. (App. 188.) In that affidavit Bressette stated under oath that at the request and direction of the State's witness Cameron he had given perjured testimony against the Eisenbergs at their trial. (App. 188-190.) In its subsequent decision the Court made no mention

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5. The original and nine copies of this affidavit have been filed with this Court.

6. The original and nine copies of the affidavit of Alan Eisenberg, dated June 4, 1971, have been filed with this Court. In this affidavit are set forth the circumstances of how the information set forth in the Bressette affidavit was brought to the attention of the defense.

whatever of what Bressette had said about Cameron, although it relied on the testimony of Cameron to reach its conclusion that the Eisenbergs were guilty of "disrespect" and "unprofessional conduct". See *State v. Eisenberg,* 48 Wis. (2d) 364, 372-374, 180 N.W. (2d) 529 (1970).

It is reasonable to assume that had the Court made further enquiry regarding the June, 1970, Bressette affidavit, the new information now disclosed would have been made known prior to the Court's entry of judgment in this case, and that this information would have had some considerable bearing on any credence the Court could have given Cameron's key testimony against Sydney and Alan Eisenberg. This new information demonstrates the critical effect of the Wisconsin Court's failure to address itself to the Bressette affidavit of June, 1970,[7] and of its rejection of the trial referee's findings—notwithstanding credibility was of controlling significance, and the substitution of its own findings. This new evidence emphasizes again the injury to the rights of Sydney and Alan Eisenberg worked by the State's failure to accord them a fair trial, and by the Wisconsin court's granting the State a de novo review of the evidence or trial de novo after the trial referee had found the Eisenbergs not to be guilty of the charges pressed by the State.

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7. A similar conclusion may reasonably be drawn with respect to the Court's failure to address itself to the affidavit of Racine County Assistant District Attorney Paul Lawent (App. 117), which affidavit set forth information that the State itself said would, if it was true, render the State's charges against the Eisenbergs to be without basis.

IV. A MASSIVE, MISLEADING AND PREJUDICIAL NEWS COVERAGE, AND INVOLVEMENT BY THE MILWAUKEE PRESS, TRIGGERED THE PROCEEDINGS AGAINST THE EISENBERGS, ACCOMPANIED THOSE PROCEEDINGS TO THEIR CONCLUSION, AND MADE IT IMPOSSIBLE FOR THE EISENBERGS TO BE GIVEN A FAIR HEARING.

In the petition for a writ of certiorari, filed with this Court on April 2, 1971, it was stated that a massive, misleading news coverage triggered and from the outset accompanied the State proceedings against Sydney and Alan Eisenberg, and made it impossible for the Eisenbergs to be accorded a dispassionate and fair trial. Petition for Writ of Certiorari to the Supreme Court of Wisconsin at 44-45. Except for the editorial congratulating the Wisconsin Court for adjudging the Eisenbergs guilty (App. 229), the newspaper editorials and articles that support this conclusion were not presented to this Court. The exhibits in the record which support this conclusion have now been filed with the court with this Petition for Rehearing.

Plaintiff's Exhibits O (Tr.) and P (Tr. 2126, 2165), and Defendants' Exhibits 19 (Tr. 1566), 20 (Tr. 1590), 24 (Tr. 1608), 27 (Tr. 1618) and 55 (Tr. 3326), show the Milwaukee newspapers' coverage of the events surrounding Judge Krueger's death and leading up to the commencement of the State Bar proceedings against Sydney and Alan Eisenberg. Defendants' Exhibits 1 (Tr.), 2 (Tr.), 8 (Tr. 745), 11 (Tr. 1084), 18-1 (Tr.), 25 (Tr. 1609), 33 (Tr. 2003), 39 (Tr. 2166), 43 (Tr. 2767), 45 (Tr. 2767) and 63 (Tr. 3931), are examples of the Milwaukee

newspapers' coverage of this case following the commencement of the State proceedings against the Eisenbergs.[8]

Given the newspaper coverage evidenced by these exhibits it is not unreasonable to conclude that a presumption was created that the charges made against the Eisenbergs by the newspapers were true, that when those charges were adopted and pressed against the Eisenbergs by the State this presumption became a conclusion, and that the news coverage blinded even responsible men to the possibility that Sydney and Alan Eisenberg might be innocent. There is no other reasonable explanation for the unfair treatment[9] received in this case by the Eisenbergs at the hands of the State.

CONCLUSION

In *Eisenberg v. Boardman,* 302 F. Supp. 1360, 1362-1364 (W.D. Wis. 1969), a three-judge court determined that licensed attorneys in Wisconsin have rights secured under the Ist Amendment to the United States Constitution, and that, absent extortionate conduct, Sydney and Alan Eisenberg had a right to engage in speech activities—including the placement of newspaper advertisements, critical of an elected judge and not regarding litigation in which they were engaged. Subsequently, the trial referee in this case found that Sydney and Alan Eisenberg were not guilty of any extortionate conduct and that the only thing they had done was to engage in speech activity. (App. 102.) In May of 1970 the Seventh Circuit

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8. Plaintiff's Exhibit O, and Defendants' Exhibits 43 and 45, are complete newspapers or sections of newspapers. The news stories in question are found, respectively, at Milwaukee Journal, Aug. 31, 1968, sec. 1 pp. 9, 13; Milwaukee Sentinel, Aug. 8, 1969, sec. 1, p. 14; Milwaukee Journal, Aug. 7, 1969, sec. 2, p. 3.

9. *See* Petition for Writ of Certiorari to the Supreme Court of Wisconsin at 44-63.

Court of Appeals determined that attorneys' rights secured under the Ist Amendment, to engage in speech activities concerning even litigation in which they are engaged, may not be abridged absent a specific showing of some threat to the administration of justice. *Chase v. Robson,* 435 F. (2d) 1059, 1061 (7th Cir. 1970).

The decision of the Wisconsin Supreme Court in this case, which was rendered subsequent to both of the Federal court decisions noted, is not reconcilable with either of those decisions, and it imposes a serious chilling effect on the exercise by licensed attorneys in Wisconsin of rights secured under the Ist Amendment. In light of the precedent concerning Federal court review of State court decisions in bar disciplinary cases such as here, there is little, if any, likelihood that the Wisconsin Court's decision in this case, and the critical questions it raises concerning licensed attorneys' rights under the Ist and XIVth Amendments to the United States Constitution, will be reviewed unless the Supreme Court of the United States issues its writ of certiorari to the Wisconsin Court in this case.

Your petitioners, Sydney and Alan Eisenberg, respectfully pray this Court, the Supreme Court of the United States, that it grant rehearing of its decision not to issue writ of certiorari in this case. And they further pray that said writ issue to the Wisconsin Supreme Court in this case.

Respectfully submitted,

RICHARD L. CATES
JOHN H. BOWERS
BRUCE F. EHLKE

LAWTON & CATES
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds set forth at U.S. Sup. Ct. R. 58.

Attorney for Petitioners